SERVED: August 16, 1994

NTSB Order No. EM-175

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of July, 1994

J. W. KIME, Commandant, United States Coast Guard, v. GEORGE W. RAYMOND, Appellant.	Docket ME-154

OPINION AND ORDER

Appellant, by counsel, seeks review of a decision of the Commandant (Appeal No. 2541, dated June 9, 1992) affirming a decision and order entered by Coast Guard Administrative Law Judge Rosemary A. Denson on August 13, 1991, following an evidentiary hearing that concluded on February 21, 1991.[1] The law judge had sustained a charge that appellant had used a

[1]Copies of the decisions of the Commandant and the law judge are attached.

dangerous drug (namely, marijuana) and had ordered that appellant's Merchant Mariner's License (No. 613702) and Document (No. 355-40-1968) be revoked. As we find that appellant has not established reversible error in the Commandant's affirmance of the law judge's decision, we will deny the appeal, to which the Coast Guard has filed a reply in opposition.

Appellant presses here essentially all of the objections to the law judge's decision that the Commandant concluded did not justify the invalidation of several drug tests that revealed an impermissible marijuana metabolite level in a urine sample appellant had given. He has not, however, in our judgment, demonstrated error in the Commandant's conclusion that, notwithstanding several departures from the literal requirements of the U.S. Department of Transportation's (DOT) regulations on proper specimen collection and handling procedures,[2] there was substantial compliance with those regulations and any technical violations of them that did occur did not undermine the integrity of the sample or the adequacy of its chain-of-custody.[3] We are satisfied, for the reasons articulated in the Commandant's decision, that he correctly determined that no variance from the

[2] See 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs.

[3] We have rejected the view that any deviation from the requirements of DOT's drug-testing regulations must be treated as fatal to the use in evidence in a Coast Guard proceeding of the results of a test, concluding, instead, that there can be de minimis or irrelevant breaches of the regulations and their antecedent guidelines. See Commandant v. Sweeney, NTSB Order No. EM-176 (served August 16, 1994).

drug-testing regulations requiring a reversal of the law judge's decision was identified, and that, therefore, the marijuana-positive results of the testing were sufficient to establish the presumption, not rebutted by appellant, that he had used a dangerous drug. At the same time, we believe that some discussion of one of the arguments rejected by the Commandant is warranted.

Appellant contends that he was denied due process because he was not given a sample of the urine specimen previously screened so that it could be subjected to further testing designed to rule out the possibility that it could have been someone else's.[4] The Commandant's response to this contention is somewhat ambivalent. On the one hand, he notes that the appellant did not subpoena an additional aliquot, thereby suggesting that he had, by failure to follow proper procedure, waived or forfeited a right he might otherwise have had to order the supplementary tests he desired. On the other hand, the Commandant asserts that the regulations effectively prohibit testing that is not intended to determine the presence of controlled substances, thereby reflecting a position which would not recognize any entitlement to testing for other purposes. We find it unnecessary to decide either the relevancy of the subpoena issue or whether DOT's regulations allow or forbid the

[4]Aliquot from the specimen had already been tested three times, twice by the Greystone Health Science Corporation and once by a laboratory of appellant's own choosing. All of the tests were positive for marijuana metabolite.

testing appellant sought to have performed, for we believe the appellant's due process argument is one we are not free to consider.

DOT's drug testing regulations set forth elaborate and comprehensive procedures to ensure, among other things, that misidentification of specimen samples will not occur in the course of their collection and testing. By arguing that due process required that he be permitted to independently establish that no error has been made as to his specimen, appellant is in effect challenging, in an untimely and collateral manner, the constitutional adequacy of the chain-of-custody provisions the DOT adopted in its regulations. The Board is not empowered to review such challenges.[5]

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and

2. The Commandant's decision affirming the decision and order of the law judge is affirmed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

[5] See, e.g., Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972), wherein we held that the Board lacks authority to rule on the constitutional validity of regulations promulgated by the Administrator of the Federal Aviation Administration. The FAA, like the Coast Guard, is an agency within the DOT.